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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL SEPULVEDA, Defendant and Appellant.	B216048 (Los Angeles County Super. Ct. No. BA187808)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed.

Frank P. Sprouls for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

In 1999, defendant and appellant Gabriel Sepulveda, a Mexican citizen and permanent resident of the United States, was charged with two counts of robbery in violation of Penal Code section 211.[1] He entered into a negotiated plea agreement in which he pled nolo contendere to one of the robbery counts and was placed on formal probation, pursuant to a variety of conditions, including that he serve 364 days in jail. Upon his return from a trip to Mexico in 2006, the Department of Homeland Security initiated removal proceedings against defendant, based on defendant's robbery conviction. Defendant subsequently filed a motion under section 1016.5 to vacate his guilty plea, along with a petition for a writ of error *coram nobis* seeking the same relief.

Defendant timely appealed the denials of his motion and petition, contending the trial court erred in denying statutory and equitable relief. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The information charged defendant with the second degree robberies of Martin Jacinto on June 2 and 17, 1999.[2] On September 10, 1999, while represented by counsel, he withdrew his not guilty pleas and entered into a negotiated plea agreement. Under the terms originally negotiated, defendant would enter a nolo contendere plea to the first robbery count, receive a five-year suspended state prison sentence, and be placed on three years formal probation with one year in county jail as a condition of probation. The second robbery count would be dismissed in the interest of justice.

Upon questioning by the prosecutor, defendant said that he understood the terms of the plea agreement and was not being coerced; he felt that entering into the agreement was in his best interest. After defendant waived his constitutional trial rights, the prosecutor informed him: "If you are not a citizen of the United States, you will be

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[1] All further statutory citations are to the Penal Code.

[2] In his writ petition, defendant admits that he "behaved horribly" when he "attempted to to rob a person who was simply selling ice cream on the street in a hand-held cart."

deported. However, if for some reason you are not a citizen and you are not deported, this plea could have [the] consequence of denial of naturalization or refusal of re-admission to the United States. Do you understand that?" The record indicated that defendant conferred with his counsel before asking: "I am going to be deported? I am a resident alien." The prosecutor replied, "I cannot tell you what the I.N.S. is going to do. All I know, recently non-citizens have been pretty much deported after pleading guilty to a felony offense."[3] Defendant replied, "What are you trying to say? They are going to take away my papers?" The prosecutor again responded that he did not know what the federal authorities would do, but if defendant was not a United States citizen, he faced deportation.

After additional private consultation, defendant's counsel stated they were ready to proceed. The trial court told the parties it had recently been informed that for purposes of federal immigration law, crimes of moral turpitude and crimes of violence were both considered "deportable criminal offenses." As such, there was a risk that defendant's robbery conviction by plea would make him subject to deportation. State decisional law required the prosecutor to tell defendant "that he will be deported." However, because the prosecutor did not represent the federal authorities, "[h]e can't make any of those determinations himself." At the prosecutor's request, a bench conference took place, which was not reported.

When the hearing resumed, the prosecutor represented that the plea agreement had been modified, subject to the trial court's approval, so that the local custody term would be reduced by one day to 364 days as a condition of probation.[4] The prosecutor asked

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[3] At that time, the responsible federal agency was the Immigration and Naturalization Service. "[T]hat agency has since been reorganized into the Department of Homeland Security. Deportations are now prosecuted by United States Immigration and Customs Enforcement. (See *U.S. v. Garcia-Beltran* (9th Cir. 2006) 443 F.3d 1126, 1129, fn. 2 ['The INS is now known as Immigration and Customs Enforcement (ICE)'].)" (*People v. Villa* (2009) 45 Cal.4th 1063, 1067, fn. 1.)

[4] Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) makes an alien deportable if he or she has been convicted of an

defendant, "The citizenship advisement that I have just given you, [defendant], do you understand?"[5] Defendant said, "Yes." After that, defendant entered his plea. His counsel joined in the constitutional waivers, concurred in the plea, and stipulated to a factual basis for the plea. The trial court accepted the plea, having found defendant's waiver of constitutional rights and plea were made voluntarily. In accordance with the modified plea agreement, the trial court imposed, but suspended, the five-year robbery term and placed defendant on three years formal probation with a variety of terms, including that he serve 364 days in local custody. Defendant accepted those terms and conditions of his probation.

Defendant served his jail term without suffering any immigration consequences upon his release. He worked steadily and raised a daughter with his common law wife. However, upon his return from a trip to Mexico years later, he "was apprehended at the airport and placed in Removal proceedings by the [United States Citizenship and Immigration Services Department[6]]" because his robbery conviction was deemed "an aggravated felony," which subjected him to deportation under federal immigration laws.

In his declaration, filed in support of his section 1016.5 motion, defendant stated his counsel did not discuss with him the immigration consequences of the plea agreement. The first time he heard about them was during the plea colloquy itself. During the discussion held off the record, "the attorneys had a lengthy discussion" and

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"'aggravated felony,' defined as a 'crime of violence . . . for which the term of imprisonment [is] at least one year.' (Immig. & Nat. Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).)" (*People v. Segura* (2008) 44 Cal.4th 921, 927.) Thus, it would appear that the parties agreed to reduce the jail term in the belief that it would not satisfy the definition of an "aggravated felony" for purposes of the immigration laws.

[5] Nothing in the transcript or anywhere else in the record supports defendant's assertion on appeal that it was defense counsel who asked if defendant understood the citizenship advisement. Moreover, the trial court read the transcript and recalled that it was the prosecutor who asked the question.

[6] The documents attached to defendant's writ petition indicate he was cited for the immigration-related violation in May 2006 and given notice of a hearing in Immigration Court to be held on August 13, 2008.

defendant's counsel told him that his jail term would be 364 days. Defendant "was told that since the sentence was less than one year, [defendant] would not face deportation." Defendant does not declare that he would have refused the plea deal if he had understood that the terms did not effectively insulate him against deportation.

The hearing of his section 1016.5 motion and writ petition was held on April 16, 2009, before the same judge who presided over his 1999 change of plea proceeding. The trial court recalled that during the unreported bench conference, defense counsel asked the trial court whether it would accept a jail term of one day less than a full year in order to "enhance[] . . . his possibilities" of avoiding deportation. The judge did not object to the modification, although she expressed her opinion that "this was a ridiculous charade."[7] In open court, the prosecutor stated the only change to the plea agreement was the one-day reduction in county jail time. Following that statement, the prosecutor asked defendant whether he understood the "citizenship advisement" as previously given. Defendant replied in the affirmative.

In denying the motion and writ petition, the trial court found the citizenship advisement was accurate and not misleading, and that defendant failed to present any evidence that his asserted misunderstanding concerning the potential immigration consequences caused him to enter the agreement. The trial court also found the agreement was very favorable because defendant avoided serving any prison time and receiving a second "strike" conviction.

DISCUSSION

Defendant contends the trial court erroneously denied his motion under section 1016.5 to permit withdrawal of his guilty plea on the ground that the advisement concerning immigration consequences was insufficient to communicate the true risk of future deportation. We perceive neither error nor prejudice.

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[7] It is not clear whether the trial court's statement was conveyed to counsel and defendant or only to the former.

"Section 1016.5 provides that '[p]rior to acceptance of a plea of guilty or nolo contendere [no contest] to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.' (§ 1016.5, subd. (a).)" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 191 (*Zamudio*).) Failure to provide the required advisement, coupled with a showing of prejudice, will entitle the defendant to an order vacating the judgment and permitting the defendant to withdraw the plea of guilty or nolo contendere, and to enter a plea of not guilty, pursuant to section 1016.5, subdivision (b). (*Id.* at pp. 191, 199-200.)

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised." (*People v. Totari* (2002) 28 Cal.4th 876, 884; see *Zamudio, supra,* 23 Cal.4th at p. 198 ["'[n]ormally a motion to vacate a plea based on misadvisement or omission of a collateral consequence requires the defendant to demonstrate that he would not have entered into the plea had he known of the consequence.' [Citation.] We see no indication that the Legislature intended section 1016.5 to operate as an exception."].)

As the lower court found, defendant failed to satisfy the first and third requirements. Although he phrased it in mandatory terms, rather than in the conditional language set forth in the statute, the prosecutor informed defendant of the three statutorily enumerated risks—deportation, exclusion from admission to the United States, or denial of naturalization. "[O]nly substantial compliance is required under section 1016.5 as

long as the defendant is specifically advised of all three separate immigration consequences of his plea." (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174.) Certainly defendant's advisement in no way departed from the legislative intent of promoting fairness to noncitizens accused of crimes "by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea." (§ 1016.5, subd. (d).) Moreover, the trial court took pains to explain that deportation would not be the invariable result because the authority for pursuing the immigration consequences rested with the federal authorities, not with the local prosecutor's office.

Nevertheless, defendant argues the trial court failed to perceive and correct defendant's asserted misunderstanding that the one-day reduction of county jail time would prevent the robbery conviction from ever being deemed a deportable offense. According to defendant, the only reasonable interpretation of events was that the parties believed they had fashioned "an 'immigration-safe' disposition by reducing the sentence to 364 days." We disagree. Not only did the trial court inform counsel of its profound skepticism that the modification would be effectual, but defendant's proffered inference is not the only, or even the most reasonable, inference from the record. While it would be reasonable to infer the parties intended the local custody reduction to reduce the likelihood of future deportation proceedings, there is no reason to believe they understood the one-day reduction would entirely foreclose that possibility. More importantly, even if defendant labored under such a misconception, nothing in the record suggests it was attributable by any action or omission by the trial court. In all instances reflected in the record, defendant was informed that his guilty plea subjected him to the risk of deportation and related immigration consequences.

Defendant argues the lower court was required to perform a more searching inquiry into whether defendant understood the immigration consequences of his plea, in accord with the advisement for a guilty plea pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122. Leaving aside the fact that defendant

presents no authority for extending *Boykin/Tahl* to this context, defendant overlooks the facts that his advisement substantially comported with statutory requirements and that nothing in the record indicates the trial court misled him as to the potential immigration consequences of his plea. As such, we fail to understand how his situation can be properly analogized to that of a "silent record" case requiring automatic reversal under *Boykin-Tahl* precedent. (See *People v. Mosby* (2004) 33 Cal.4th 353, 361 ["Truly silent-record cases are those that show no express advisement or waiver of the *Boykin-Tahl* rights before a defendant's admission of a prior conviction."].)

In any event, as the trial court found, there was no substantial evidence that defendant would not have pleaded nolo contendere if he had been advised that the plea agreement did not insulate him against the possibility of future adverse immigration consequences. (See *People v. Totari, supra,* 28 Cal.4th at p. 884.) Not only did defendant's supporting declaration fail to include such an assertion, but to the extent he presented any evidence of a disinclination to face deportation, it all concerned events and circumstances that arose long after his guilty plea. In contrast, as the lower court found, the plea arrangement was so favorable that it would have been quite reasonable for defendant to accept it even if he understood that his robbery conviction would potentially subject him to deportation. The fact that defendant would later forge strong familial and social bonds within his local community does not provide meaningful evidence as to his state of mind at the relevant time.

We turn to the *coram nobis* aspect of defendant's appeal, which we review under the abuse of discretion standard. (*People v. Kim* (2009) 45 Cal.4th 1078, 1095.) At the start, however, we note that our Supreme Court has recently indicated that *coram nobis* relief is not intended as a substitute for seeking statutory relief under section 1016.5. (*Id.* at pp. 1106-1107.) Assuming such collateral relief is available and defendant satisfied the procedural requirements for invoking the *coram nobis* doctrine, he fails to "satisfy the strict requirements for this extraordinary type of collateral relief from a final judgment." (*Id.* at pp. 1101-1102.) Defendant fails to demonstrate """that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on

the merits, and which if presented would have prevented the rendition of the judgment.'" [Citation.]" (*Id.* at p. 1102.)

In *People v. Kim, supra,* 45 Cal.4th 1078, the defendant, who was facing deportation to South Korea, sought to vacate a 1997 guilty plea that formed the basis for the federal immigration authority's deportation efforts. In support of his writ petition, the defendant alleged he would not have pleaded guilty if "he had been armed with" the fact that his plea would have adverse immigration consequences or "that counsel would have been successful in arranging a plea to a nondeportable offense had these facts been known." (*Id.* at pp. 1102-1103.) Our high court held that in relying on such allegations, the defendant "fundamentally misapprehends the pertinent inquiry. To qualify as the basis for relief on *coram nobis,* newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. [Citations.] Such facts often go to the legal competence of witnesses or litigants, or the jurisdiction of the court. New facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment." (*Id.* at p. 1103.)

Defendant's allegations and argument differ in no material respect. As our previous analysis has shown, to the extent defendant presented the lower court with any new facts, they were not facts that would have prevented rendition of the judgment. (See *People v. Kim, supra,* 45 Cal.4th at p. 1093 ["For a newly discovered fact to qualify as the basis for the writ of error *coram nobis,* we look to the fact itself and not its legal effect. 'It has often been held that the motion or writ is not available where a defendant voluntarily and with knowledge of the facts pleaded guilty or admitted alleged prior convictions because of ignorance or mistake as to the legal effect of those facts.' [Citation.]"].)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

I concur:

TURNER, P. J.

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MOSK, J., Concurring

I concur.

One can only draw the conclusion from what occurred, that appellant was misled into believing his plea would have no immigration consequences. Why else would the parties and the trial court engage in what the trial court called a charade by shaving one day off the jail sentence? That defendant evidenced a reluctance to enter a plea with immigration consequences suggests that he would not have entered the plea if he had known of the possible immigration consequences of pleading no contest. Nevertheless, our standard of review is abuse of discretion. (*People v. Superior Court* (Zamudio) (2000) 23 Cal.4th 183, 192.) Moreover, our Supreme Court has foreclosed most avenues for challenging pleas under these circumstances. (*People v. Kim* (2009) 45 Cal.4th 1078; *People v. Villa* (2009) 45 Cal.4th 1063.) Thus, I must concur in the judgment.

This case exemplifies what was said by one justice of the Supreme Court. "In recent years, the immigration consequences of criminal convictions have verged on the monstrously cruel in their harshness compared to many of the crimes on which they are imposed." (*In re Resendiz* (2001) 25 Cal.4th 230, 255 (conc. and dis. opn. of Mosk, J.).) Here, some years after defendant committed a crime for which he was incarcerated for less than a year, defendant, who was a resident alien, who entered the country at age of five months, has raised his family in the United States, has no subsequent criminal record, is employed, and has received praise from his employers. To refuse him entry into this country punishes his American family, as well as him. Perhaps defendant can seek relief from the executive.

MOSK, J.